PERMALU A/L VYRAPAN

v.

G. PAPATHI D/O GOVINDASAMY

HIGH COURT, PENANG
TUAN VINCENT NG KIM KHOAY J.
[CIVIL SUIT NO. 22-260-85]
20 MAY 1994

PRACTICE & PROCEDURE: Plaintiff's suit fixed for hearing on 8 December 1993 - Parties notified by letter dated 18 October 1993 - On hearing date, both parties present but plaintiff's Counsel absent - Plaintiff not wishing to conduct his own case and presiding Judge dismissing suit with costs - Application to set aside Court Order dismissing plaintiff's claim - Application praying for reinstatement of suit - Whether plaintiff adopted wrong procedure - Whether plaintiff should have appealed against the Order - Consideration of O. 35 rr. 1(2) & 2(1) Rules of the High Court 1980 - Whether plaintiff's application should be allowed.

WORDS & PHRASES: "one party" - O. 35 r. 2(1) RHC 1980 - Meaning of.

After a number of postponements the plaintiff's suit was fixed for hearing on 8 December 1993. Both parties were notified, through their Counsel, by way of a Notice of trial dated 18 October 1993. On 7 December 1993, plaintiff's Counsel wrote in requesting for a postponement on the grounds that the said Counsel would be on leave on the hearing date.

On the day fixed for hearing, the defendant, her Counsel and her witnesses were present in Court. The plaintiff was present in person but his Counsel was absent. The learned Judge gave the plaintiff an opportunity to conduct his own case in the absence of his Counsel. Upon being informed by the plaintiff that he did not wish to conduct his own case, the learned Judge dismissed the plaintiff's suit with costs.

On the plaintiff's application to set aside the order of the learned Judge, the defendant raised a preliminary objection on the procedure adopted by the plaintiff and contended that as the Order of Court dated 8 December 1993 was an *inter-partes* order, the plaintiff should have appealed against the said order.

The plaintiff contended that as the case was not heard on its merits, the Court has an inherent jurisdiction to set aside its own orders and argued that the question of appeal did not arise.

Held:

[1] As Order 35 RHC 1980 expressly provides for the setting aside of a judgment or order made by the Court in cases where one party does not appear at the trial, whereas there is no such provision where both parties appear but one of them is unable to proceed, and as it is not an ommission due to inadvertance, it becomes evident that it is the intention of the Legislature that in cases of an *inter-partes* judgment or order, the setting aside of same should be by way of an appeal.

[2] As such, on examining O. 35 closely, this provision could not be invoked to assist the plaintiff in his current application as the Order of Court dated 8 December 1993 was an order made *inter-partes*, despite the absence of plaintiff's Counsel.

[3] The expression "one party" in O. 35 r. 2(1) should be taken in its plain and literal meaning and should not be read as "one party with his Counsel." To say that the word "party" encompasses also his Counsel would create an absurdity as Counsel is never a party to an action unless he is made a party in the action.

[4] In the event, the defendant's preliminary procedural objection was valid and the plaintiff's application should be dismissed with costs to the defendant.

[5] Even if the plaintiff's application could be brought within the ambit of O. 35 r. 2(1) RHC 1980, it would still be at the discretion of the Court whether to set aside the Order of 8 December 1993 and in the circumstances of this case the Court would nevertheless have declined to exercise its discretion in the plaintiff's favour.

[Plaintiff's application dismissed with costs].

Cases referred to:

Retnam Pillai v. Bahagia Trading Agency [1977] 1 MLJ 127 ***(refd)***

Loh Shan Wah v. Loh Kong Imm [1931] 7 FMSLR 238 CA ***(refd)***

Armour v. Bate [1891] 2 QB 23 ***(refd)***

Toh Hock Thye & Ors. v. Toh Chwee Biow [1982] 1 MLJ 152 ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 35 rr. 1(2), 2(i)

For the plaintiff - Darshan Singh; M/s. Darshan Singh & Co.

For the defendant - Selvaratnam Thillaimuthu; M/s. Thillaimuthu & Phock Kin

JUDGMENT

Vincent Ng Kim Khoay J:

The plaintiff had applied by a notice of motion dated 13 December 1993 (enclosure 39) for *inter alia*, the setting aside of the order of Court dated 8 December 1993 which dismissed the plaintiff's claim under this writ, and for reinstatement of the suit. This application was supported by the affidavit of the plaintiff affirmed on 14 December 1993 (enclosure 38) and the affidavit of his Counsel, Mr Darshan Singh Khaira affirmed on 13 December 1993 (enclosure 42) which was filed on 13 April 1994, precisely four months after its affirmation.

This application was resisted by the defendant by the affidavit of her Counsel Mr Selvaratnam Thillaimuthu dated 31 January 1994 (enclosure 41). The chronology of events pertaining to this matter that I have gleaned from the affidavits (the uncontroverted parts only) and the file are as follows:

The writ in this suit was issued out of the High Court at Penang on 12 March 1985. The suit was set down for trial in the fixing list of cases by notification of setting down cases dated 24 August 1989. The suit was then fixed for hearing on 8 November 1991, in regard to which notice of hearing dated 23 October 1991 was issued by the Senior Assistant Register. However, on 7 November 1991 M/s Darshan Singh & Co. wrote a letter dated 7 November 1991 to the Senior Assistant Registrar enclosing a medical chit from Kelinik Penang stating that Mr Darshan Singh was unfit for work for two days inclusive of the date of the letter (7 November 1991 and 8 November 1991) and requested a postponement of the trial. Thus, when the suit was called on 8 November 1991, a postponement was accordingly granted by the Court, and was re-emplaced in the fixing list.

The suit was next fixed for trial on 13 February 1992 and notice of this hearing dated 9 January 1992 was duly issued by the Senior Assistant Registrar. Then, on 11 February 1992, which was just 2 days before the hearing date above, the plaintiff's solicitors filed an application by way of summons-in-chambers dated 11 February 1992 for an order that the name of G. Letchumanan Naidu (husband of the defendant) be added as 2nd defendant (this, notwithstanding that the name of the said G. Letchumanan had been struck off as the 2nd defendant in the writ by order of Court made on 22 May 1986 upon an earlier application made by the defendant). Because of the late application by the plaintiff for amendment, the trial fixed for 13 February 1992 was postponed to enable the said summons-in-chambers to be heard. The application under the said summons-in-chambers was heard on 26 May 1992 and as expected, was dismissed by the Court.

The suit was then fixed for hearing on 22 December 1992 and notice of hearing dated 13 October 1992 was duly issued by the Senior Assistant Registrar. However, as the learned Judge was due to take up appointment as Judge of the Supreme Court in January 1993 the suit was not heard as fixed, and was taken off for another date of hearing to be fixed.

The defendant was unhappy over the delays and was very anxious that the suit should be heard and disposed of without delay, the alleged cause of action having arisen as early as September 1982. The defendant's solicitors therefore wrote a letter dated 19 August 1993 to the Court and copied to M/s Darshan Singh & Co. requesting for an early date of trial to be fixed. The Senior Assistant Registrar, responding accordingly, fixed 8 December 1993 for the hearing and notified Counsel for both parties by notice of trial dated 18 October 1993.

Though the notice of trial dated 18 October 1993 was received by Messrs Darshan Singh and Company some time around that date, it was only on 7 December 1993 that a letter (of even date) was written by the legal firm to the Senior Assistant Registrar requesting for postponement of the trial of the suit on the grounds that Mr Darshan Singh would be "on leave on 7 and 8 December 1993." This letter was received by the Court at 3.00 p.m. on 7 December 1993 (the eve of the scheduled trial) and by the defendant's solicitors on the afternoon of the same day.

On 8 December 1993 the suit was called up for hearing before my brother Mohd Nor bin Haji Abdullah who was then the Court resident Judicial Commissioner of the Alor Star High Court, and who had come down to Penang to hear a few matters in our Court No. 3 including this suit. When the case was called, defendant's Counsel, the defendant herself and her witnesses were in Court and expressed their readiness to commence the trial of the suit. The plaintiff was present in person but Mr Darshan Singh was absent. Faced with that situation the Court, quite properly, stood down the trial of the

matter for about 20 minutes to enable the plaintiff to contact his Counsel for instructions, as the defendant had objected to any adjournment due to the fact that this was a 1985 civil suit. After an interval of 20 minutes the case was again called up in Court and Mr Darshan Singh had not turned up. His Lordship then gave the plaintiff an opportunity to conduct his own case in the absence of his Counsel if he wished, after informing him that he would not grant a postponement in the circumstances. The plaintiff thereupon informed the Court that he did not wish to conduct his own case, and the presiding Judge dismissed the suit with costs.

The plaintiff's application was resisted on two grounds. Firstly, Mr S. Thillaimuthu contended that the wrong procedure was adopted by the plaintiff, who should have appealed against the order of Court dated 8 December 1993 rather than apply to have it set aside. Counsel had submitted that the 8 December 1993 order was an order made *inter-partes* as the plaintiff was present; it was not a default judgment obtained by the defendant under O. 35 r. 1(2) of the Rules of the High Court 1980 ("RHC") in which event it would be liable to be set aside on terms under O. 35 r. 2(1). It was further submitted that O. 35 r. 1(2) envisaged a position whereby only one of the parties was present but in the case at hand, both parties were present. Consequently, the Court was *functus officio* as it had no power to set aside an order entered into *inter-partes*, which could only be set aside on appeal. In support of his contention Counsel cited *Retnam Pillai v. Bahagia Trading Agency* [1977] 1 MLJ 127. In that case it was held *inter alia* that it was the intention of the Legislature that in cases of *inter-partes* judgment the setting aside of the judgment should be by way of an appeal.

Then, at this juncture, Counsel for the plaintiff applied for an adjournment of the hearing of the plaintiff's application herein (under enclosure 39) on the grounds that this preliminary objection had taken him by surprise. I promptly overruled this objection, as paragraph 14 of enclosure 41 had clearly stated that the defendant intended to make a "preliminary procedural objection to this application at the hearing of this motion."

Upon the request for an adjournment being refused, Mr Darshan Singh then submitted, with apparent persuasiveness, that, to quote:

> This Court has an inherent jurisdiction to set aside its own orders especially when the merits have not been heard or decided. A party only appeals when the case is heard on merits and the defence of *res judicata* is applicable. This case was not ready for trial due to circumstances beyond the plaintiff's control. There is no prejudice to the defendant and defendant could have been compensated with costs. It cannot be said that it is *inter-partes* because plaintiff was present - only if matter decided on merits or evidence led.

The Court's determination on the preliminary objection concerning procedure adopted by the plaintiff would largely turn on its construction of O. 35 r. 1(2) of the RHC which states that:

> If, when the trial of an action is called on, one party does not appear, the Judge may proceed with the trial of the action or any counterclaim in the absence of that party.

and O. 35 r. 2(1) which states that:

> Any judgment or order obtained where one party does not appear at the trial may be set aside by the Court, on the application of that party, on such terms as it thinks just.

I am of the considered opinion that as the rules expressly provide for the setting aside of a judgment or order made by the Court in cases where one party does not appear at the trial, whereas there is no such provision where both parties appear but one of them is unable to proceed (e.g. on the grounds that he does not have the assistance of his Counsel), and as it is not an omission due to inadvertence, it becomes evident that it is the intention of the Legislature that in cases of an *inter-partes* judgment or order, the setting aside of same should be by way of an appeal. As such, on examining O. 35 of RHC closely I was constrained to hold that this provision could not be invoked to assist the plaintiff in his current application as I was also of the view that the order of Court dated 12 December 1993 was an order made *inter-partes*, despite the absence of the plaintiff's Counsel. The expression "one party" in O. 35 r. 2(1) should be taken in its plain literal meaning and should not be read as "one party with his Counsel." To say that the word "party" encompasses also his Counsel would create an absurdity as Counsel is never a party to an action unless he is made a party in the action. We are aware that it is not entirely uncommon for plaintiffs or defendants to conduct their own cases in Court; Counsels are engaged only to assist the party to conduct cases due to the former's expertise.

The fact that his Lordship Mohd Nor had allowed the plaintiff to present his case and to adduce evidence (and the plaintiff's refusal to do so) would by itself constitute a complete answer to Mr Darshan Singh's contention that it was not an order made *inter-partes* for being devoid of a trial.

In the event, I upheld the defendant's preliminary procedural objection and dismissed the plaintiff's application under enclosure 39 with costs to the defendant.

For completeness, I shall also consider whether, even had this Court overruled the defendant's preliminary objections on the issue of procedure adopted by the plaintiff, could the plaintiff have succeeded on merits?

The approach that Courts may adopt when faced with the problem such as in the instant case is as follows:

If plaintiff is present but not defendant then judgment could be recorded for the plaintiff but only after the latter has adduced some evidence in support of his claim. (See *Retnam Pillai (ibid)*). In the event that both parties are present whereas the plaintiff is present without his Counsel, the Court should first ascertain whether the plaintiff wished to have his case heard (and if so, to adduce evidence to support his claim). And if the plaintiff then declines to do so the Court may dismiss the plaintiff's claim - see *Loh Shan Wah v. Loh Kong Imm* [1931] 7 FMSLR 238, CA: On the other hand, if the plaintiff does not appear but the defendant is present at the trial and ready to proceed then the defendant is entitled to judgment dismissing the claim, and he may then proceed to prove his counterclaim if any. See *Armour v. Bate* [1891] 2 QB 23.

In the present case both the parties were present but the plaintiff was present without his Counsel. Even if the plaintiff's application could be brought within the ambit of O. 35 r. 2(1) (which I have earlier ruled against the plaintiff), it would still be at the discretion of the Court - as conceded by the plaintiff's Counsel - whether to set aside the order of 8 December 1993. This Court would nevertheless have declined to exercise its discretion in the plaintiff's favour after having carefully considered the circumstances of the case and for the following reasons:

This suit had been long outstanding, wherein the alleged cause of action had arisen as early as September 1982 which resulted in the claim being filed on 12 March 1985. The notice of trial was served on the plaintiff's Counsel some time around 18 October 1993, yet it was only at the eleventh hour, in the afternoon of 7 December 1993, that the plaintiff's Counsel wrote to the Court to say that he "would be on leave" for two days, on 7 and 8 December 1993. The trial Judge had given ample opportunity for the plaintiff to contact his Counsel by standing down the matter for 20 minutes. Counsel for the plaintiff was neither on sick leave nor on emergency leave but merely "on leave". Yet, he did not even have the courtesy to get another lawyer to mention on his behalf on 8 December 1993; and indeed, as the letter was dated and signed 7 December 1993 it would appear that he was working in his office on 7 December 1993, while he was supposed to be "on leave". This itself showed a contumelious conduct, disrespectful of Court, such as would bring it somewhat within the ambit of the principles expressed in the *dictum* of Salleh Abas FC in the case of *Toh Hock Thye & Ors. v. Toh Chwee Biow* [1982] 1 MLJ 152. Therein it was held that the failure to explain, through non-attendance on a show cause notice as to why the action should not be dismissed for want of prosecution, was nothing but an intentional and contumelious act disrespectful of the Court.

Before making the order of 8 December 1993 the presiding Judge had carried out the procedures required of him by standing down the matter for 20 minutes. Most importantly, by having given the plaintiff the opportunity to conduct his own case in the absence of his Counsel, after informing him that he would not grant a postponement of the case in the circumstances, the impact of the plaintiff's contention - that it was not an *inter-partes* order as the Judge had decided without considering the merits of the claim or upon evidence led - had been completely negated.

Any sympathies for the plaintiff in his current predicament would grossly be misplaced and it would encourage an indolent party or a party who intends to delay proceedings to seek last minute adjournments on the ground that his Counsel is on leave. Be it noted that postponements are granted as a matter of grace or on sufference of the Courts but not by (litigant's) right. The Courts ought not, so readily, to overlook the fact that, by retaining a particular lawyer among so many, a litigant has thereby signalled to the Court the trust and confidence

he has reposed on that lawyer to conduct the prosecution of his case responsibly and with the expected competency; thus the litigant should be left by himself to seek remedy against his own lawyer should the latter be found wanting on this score. Such a litigant should not be coddled by the Court in the name of justice.

For the above further reasons the plaintiff's application herein would in any event, on its merits, also have been dismissed with costs to the defendant.

The approach taken by me and Mohd Nor bin Haji Abdullah JC (as he then was) in this case may appear to be somewhat drastic, but it is nevertheless wholly consistent with the dictates of the current conditions of our Courts in terms of backlog of cases; and, in this case, no doubt amply contributed to by the nonchalant conduct of Counsel to the Court. In this application for reinstatement, even if the plaintiff had succeeded on the preliminary issue, I would nevertheless have decided not to exercise my discretion for the compelling reasons aforesaid, yet I am mindful that essentially the exercise of such discretion has to be decided upon the individual merits of each application.

PUBLIC PROSECUTOR

v.

HON JIEW FOH @ AH HO

HIGH COURT SABAH & SARAWAK, KUCHING
DATO' HAJI ABDUL KADIR BIN SULAIMAN J.
[CRIMINAL REVISION NO. KG. 2 OF 1994 (II)]
25 JUNE 1994

CRIMINAL PROCEDURE: Criminal revision - Order of discharge not amounting to an acquittal - Power of Magistrate to make order - Propriety of grounds for order - Accused discharged when prosecution ready to proceed with trial - Whether order thereof valid - CPC ss. 173, 325

CRIMINAL PROCEDURE: Control and conduct of prosecution - Whether lies entirely with the Public Prosecutor - Whether Magistrate had power to direct Prosecuting Officer to refer investigation papers to Public Prosecutor - CPC s. 376, Federal Constitution Art. 145(3).

This criminal revision was in respect of an order of the Magistrate discharging the accused herein not amounting to an acquittal. The facts showed that the Magistrate, in making the said discharge order, had not grounded the order upon any of the grounds laid down in s. 173 CPC but solely for the reason that the Prosecuting Officer had failed to refer the investigation papers in respect of the charge to the Public Prosecutor, as ordered by the Magistrate. The Magistrate seemed to have taken the disobedience of the Prosecuting Officer as an act of contempt but preferred to discharge the accused in substitution of a contempt proceeding "in the exercise of his discretion". The prosecution at the material time was ready to proceed with the trial.

The issues that arose were:

(1) Whether the Magistrate, in the circumstances, could order the officer conducting the prosecution to have the investigation papers referred to the Public Prosecutor and if so, whether disobedience of such order amounted to contempt.

(2) Assuming that the Magistrate's order for reference of the papers aforesaid to the Public Prosecutor was valid, whether the Magistrate could then discharge the accused not amounting to an acquittal as an alternative to a proceeding for contempt.